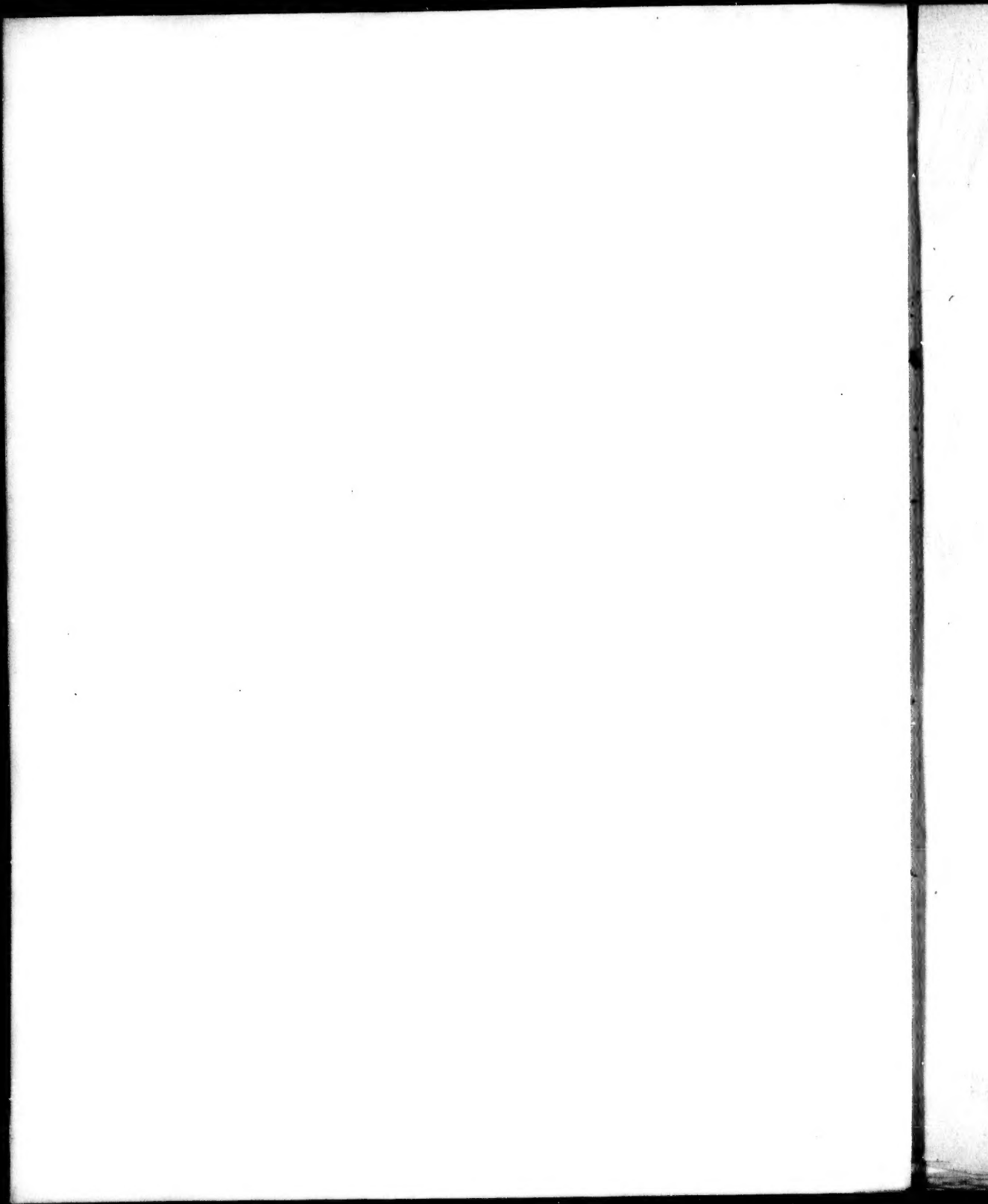




Mr Oswald

SUNDRY RESOLUTIONS

OF THE BOARD OF COMMISSIONERS

For carrying into Effect the
SIXTH ARTICLE OF THE TREATY OF
AMITY, COMMERCE, AND NAVIGATION,

CONCLUDED BETWEEN
HIS BRITANNIC MAJESTY
AND THE
UNITED STATES OF AMERICA.

Published for the Information of the
CLAIMANTS UNDER THE SAID ARTICLE
BY THE
GENERAL AGENT FOR CLAIMANTS.



PHILADELPHIA: PRINTED BY JAMES HUMPHREYS, 1798.

UNION

BOARD OF DIRECTORS

MEMBERS

OFFICERS

FINANCIAL STATEMENT

REPORT

CONSTITUTION

BY-LAWS

RESOLUTIONS

SUNDRY RESOLUTIONS, &c.

*OFFICE of the COMMISSIONERS under the Sixth
Article of the Treaty of Amity, &c. with Great-Britain.*

ORDERED, That in every case, on the presentment of a claim by an Agent, a power of attorney shall either be produced at the time of presenting the claim, or pending the consideration thereof, and that notice be given to the Agent accordingly, in order that such power of attorney, if not then produced, may be procured as soon as possible.

Ordered, That the General Agent for claimants, and the Agent for the United States, be informed, that in all cases where claimants can produce evidence respecting the solvency of their debtors during the operation of the lawful impediments complained of, the Board will expect to have such evidence stated and laid before them, without prejudice however to the right of the claimants to maintain, that it is not incumbent on them to prove such solvency.

Ordered, That all applications for the examination of witnesses, shall be lodged with the secretary in writing, signed by the Agent of the party by whom they are to be adduced; and shall state not only the names of the witnesses, but the points generally on which they are to be examined; and that a copy of such application shall at the same time, be delivered to the Agent for the opposite party.

Resolved, That no claim or complaint shall be considered as barred by the limitation of time in the treaty, if a memorial containing the full demand has been duly presented to the Board within the time thereby prescribed, although such proceedings at law as may from the circumstances of the case be necessary for the purpose of obtaining evidence in support of the same, or any part thereof, have not been completed within the time so limited; but that all possible dispatch and diligence in commencing and completing such proceedings will in every case be expected by the Board.

Resolved,

Resolved, That till the answer to a claim has been put in, and laid before the Board, raising a question of fact between the parties, no application can in common course, or without very special reasons, be received, for leave to examine witnesses against such claims.

Ordered, That all applications out of the ordinary course of proceeding before the Board, shall state specially the grounds on which they are made, and meant to be supported; and when the urgency of circumstances renders it necessary to make any such application between the sittings of the Board, that a copy thereof be forthwith sent to each Commissioner, as well as to the Agent for the adverse party.

Ordered, That the General Agent for claimants, and Agent for the United States, respectively furnish the Commissioners with copies of all papers laid before the Board, whether averments for evidence, or other representations, or statements containing incidental objections, or questions for their consideration.

Resolved, That the Board will receive such evidence only, to prove the debts which are the subjects of claim before them, as would have been competent and admissible to prove the same, immediately previous to the operation of lawful impediments in the courts of the States where the debtors at that time resided; unless upon special cause first shewn, and an order of the Board for the admission of evidence of any other description.

NOTE. The foregoing Resolutions and Orders of the Board are of different dates. They have been communicated as extensively as was in the General Agent's power, from a knowledge of, or correspondence with, the few special agents and attorneys in fact of the claimants who had come forward previous to the orders and resolutions. He thinks it necessary now, to make the information as extensive as is in his power, and to send the above, with every other material resolution or order, to every individual agent or attorney in fact for British claimants, with whom he has corresponded, or with whom he has had any communication.

OFFICE of the COMMISSIONERS under the
Sixth Article of the Treaty of Amity, &c. with Great-Britain.

PHILADELPHIA, December 18, 1798.

PRESENT,

MR. MACDONALD.

MR. RICH.

MR. FITZSIMONS.

MR. SITGREAVES.

MR. GUILLEMARD.

In the Case of Cunningham & Co.

THE resolution moved by a member of the Board on the twenty-third day of October last, on the question of *interest during the war*, which, with other general questions of interpretation, was in the answer of the United States, specially raised and submitted, on full argument, for the determination of the Board in this particular case, as involving "many important principles necessary to be decided," (which answer it appears from the letter annexed to, and printed therewith, was drawn up by the Attorney General of the United States, as a leading argument to be referred to in similar cases, and to which reference has accordingly been made) having been again moved, the matter was this day fully discussed, and the resolution passed as follows:—

THE BOARD having considered the argument of both parties on the claim of interest during the war, which is opposed on the following general grounds and principles, as stated in the answer of the United States, viz.

The rules of construction established by the law of nations for the interpretation of "obscure or ambiguous parts:—

The meaning of the word "*debts*" in the *fourth* article of the treaty of peace as not comprehending interest, because interest is recoverable at law in the technical form of *damages*, for the detention of the debt; "being what is given more than the principal, that the creditor may not be a loser:—

The inference to be drawn from the demand of a deduction of interest during the war, which had been made on the part of the United States in the course of the negotiation previous to the formation of the said article, and from a conversation subsequent to the treaty, viz, in the year 1786, between the British secretary of state for foreign affairs, and the American minister at London; in which the latter suggested "the policy of giving up the interest during the war, and of agreeing to "a plan of payment by instalments;" and the former, after "some slight expressions concerning the interest, wished that the courts were opened for recovering the principal," and observed "that the interest might be left for an after consideration:—

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The nature and causes of the war; in the course of which "the products of the land were indispensably necessary for defence against that which, on the side of the Americans, was a war for life, liberty and property: A war pro aris et focis;" attended with circumstances of such desolation (as described in the printed answer) that after the application of what was thus necessary for defence, "there was nothing left to an individual for paying interest on his debt:"—

"The interdiction of commerce to the United States by the British Parliament," and stoppage of "intercourse and access between the American debtors and British creditors," by which "the detention of the debt during the war was unavoidable:"—

The departure of creditors, and their factors, from the State, so that no person remained in the country to receive payment of the debt:—

The analogy between the present case, and that quoted from Viner's abridgment, in which it is stated, "that where by a general and national calamity, nothing is made out of lands which are assigned for the payment of interest, it ought not to run on during the time of such calamity:"—

The authority of writers on the law of nations, who support the general position, (which as such has been stated, and not disputed on the part of the United States) viz "that debts due to private persons before a war, shall be paid after the war; and with interest during the war, if such was the contract, either tacit or express:"—But who also lay it down, that "if nothing else be agreed upon, yet this is to be supposed in every peace, that no action shall be commenced for damages done in war, which is also to be understood of those done to private persons; these being also the effects of war:"—

The equity, as between creditor and debtor, of denying interest during the war, whereby "the creditor and debtor will be put upon a more equal footing; and a loss will not be incurred by the debtor, for the sake of a gain to the creditor:"—

The evidence of such equity, arising from "the practice of the courts and juries in disallowing interest during the war, generally, throughout the United States;" such being stated to have been, and to be "the practice of the courts" (and of juries in all cases that were "under the power of their verdicts") of *New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, and South-Carolina*; in "some of which States the claims (it is said) of British debts were so inconsiderable, and so few, as not to have occasioned public concern, or to have excited any prejudices:"—

The evidence of such equity, in particular, arising from the judgment and opinions delivered by the judges of one of the State courts of Virginia against the allowance of such interest, in the case of *McCall against Turner*, decided in 1796; On which occasion it was stated from the bench (as appears from the report of the case in the appendix to the answer) that on comparing "the conduct of the two nations" during the war, "the comparison was evidently in favour of America;" that of Great Britain amounting to so many defections from the modern rules of warfare, which did not entitle the creditors even to the principal debts themselves, had they not been stipulated for by the treaty of peace;" a stipulation which "although it was unjust and inconvenient in one respect, yet as the
" other

" other parts were deemed beneficial, it was right to accept, for the sake of the
" general advantages it contained :"—

And the further evidence of such equity arising from the general impression in America during the war, that " in a contest of that kind, if successful," few would be " required at a future day to pay such interest."

Resolved, That the description contained in the *fourth* article of the treaty of peace, of the nature and extent of the right and property thereby secured against the operation of lawful impediments, viz. " the full value in sterling money of all " bona fide debts, theretofore contracted," is a description in terms which are clear and explicit; and therefore, the authorities which have been referred to on the construction of " obscure or ambiguous facts," bear no application to the present question:—That the full value of a bona fide debt must mean the full amount of the obligation, with all its incidents, according to the contract:—That interest has been rightly defined on the part of the United States, to be a fixed and settled compensation for the damages sustained by the creditor through the detention or delay of payment of the original debt, " that he may not be a loser;" and in law as well as in equity, such compensation is considered as a growing increase of the debt itself; the form, in certain cases of recovering or awarding such increase of debt in courts of law, by the name of *damages*, leading to no substantial distinction, inconsistent with the known and long established nature of the right, and that common acceptance of language by which alone the treaty must be construed:—For the argument which has been laid before the Board, from the letter of Mr. *Jefferson* to Mr. *Hammond*, previous to the treaty of amity, referred to in the answer to the claim, is an elaborate misapplication of authorities on the technical distinctions and restrictive language of form in courts of law, which the framers of the treaty cannot be presumed to have known, and never meant to apply:—That if, from the denomination of damages, as applied to interest in courts of law, the conclusion could be drawn, that interest was not debt, and therefore not within the meaning of the treaty, such conclusion would affect the claim of interest in time of peace, as well as during the war, and therefore reach too far for the argument, which admits that interest accruing in time of peace is due according to the contract:—That if any reasonable ground of doubt remained, it would be removed by certain facts, as stated on the part of the United States, and from which a contrary inference has been drawn, viz. the demand, in the course of the negotiation previous to the treaty, of a deduction of interest during the war; the silence of the article on that head; the subsequent suggestion by the American minister in the year 1786, of " the policy of giving up" such interest, thereby admitting, as matter of necessary implication, that the payment of the interest to be thus " given up," had been previously stipulated and secured; and the answer made by the British Secretary of State to the suggestion of thus " giving up" the said interest on principles of policy, viz. " that it might be left for an after consideration;" with the fact that it never was on after consideration given up, but on the contrary, by the sixth article of the treaty of amity, which adopts the same general term " debts," as descriptive of the subject matter thereof, " the commissioners are empowered and required, in pursuance of the true intent and meaning of the said article, to take into their consideration all claims, whether of principal or interest, or balances of principal and " interest" (without any allusion whatever to a distinction between the case of interest during the war, and interest in time of peace) " and to determine the same " respectively, according to the merits of the several cases; due regard being had to " all the circumstances thereof, and as equity and justice shall appear to them to " require:—"

“ require :”—That the Board are thus empowered by the treaty of amity to award interest during the war; but it is rightly maintained on the part of the United States, that no award can be made under the treaty of amity, which is not founded on a right secured by the treaty of peace; therefore, an award of interest during the war will be founded on a right secured by the treaty of peace :—From all which it follows, not only that the general term “ debts” in the fourth article of the treaty of peace, comprehends the *whole* interest, as well as the *whole* principal; and that the Board are, by the treaty of amity, required to take the same into their consideration; but also, that they are bound to decide “ according to the “ merits and circumstances of the *several cases*,” upon such principles as (with reference to the said merits and circumstances of each particular case) shall appear to them to be just and equitable :—Nor is any distinction to be found in any of the treaties between that part of the claim which is composed of interest and that which is composed of principal, the Board having no greater power of decision over the one than over the other :—That it is not alledged, nor does it appear, that any special bar or ground of objection against interest during the war, arises out of the nature or terms of the contracts, or other particular merits or circumstances of this case; neither is there any general ground on which the case can be considered as forming an exception to the position arising out of the law of nations and before recited (as stated and referred to on the part of the United States) viz. “ that debts due to private persons “ before a war, shall be paid after the war; and with interest during the war, if “ such was the contract either tacit or express.” For every inference which can be drawn from the particular nature of the war, as distinct from that “ of ordinary “ wars between independent nations,” is in favour of the original contract between the parties, and gives strength and application, *a fortiori*, to the sound policy of justice, which preserves, unimpaired by national hostility, the full effect, and integrity of good faith in private transaction :—But on this head, the sentiments of the Board cannot be better expressed than in the words of a learned Judge (*Patterson*) who, in delivering his opinion in the Supreme Court of the United States on the 7th day of February, 1796, in the case of *Jones v. Hylton*, expressed himself as follows :—“ I feel no hesitation in declaring, that it has always appeared to me to “ be incompatible with the principles of justice and policy, that contracts entered “ into by individuals of different nations should be violated by their respective go- “ vernments, in consequence of national quarrels and hostilities—*National differences “ should not affect private bargains*. The confidence, both of an individual and na- “ tional nature, on which the contracts were founded, ought to be preserved invio- “ late. Is not this the language of honesty and honor? Does not the sentiment cor- “ respond with the sentiments of justice and the dictates of the moral sense? In short, “ is it not the result of right reason and natural equity? The relation which the “ parties stood in to each other at the time of contracting these debts, ought not to “ pass without notice. The debts were contracted when the creditors and debtors “ were subjects of the same King, and children of the same family. They were “ made under the sanction of laws common to, and binding on both. *A revolu- “ tionary war could not like other wars* be foreseen or calculated upon :—The thing “ was improbable :—No one at the time the debts were contracted had any idea “ of a severance or dismemberment of the empire, by which persons who had “ been united under one system of civil polity should be torn asunder, and become “ enemies for a time, and perhaps aliens forever. Contracts entered into in such “ a state of things ought to be sacredly regarded :—Inviolability seems to be at- “ tached to them.”—“ The construction of a treaty made in favour of such cre- “ ditors, and for the restoration and enforcement of pre-existing contracts, ought “ to be liberal and benign :—For these reasons this clause in the treaty deserves the

“ utmost

" *utmost latitude of exposition* :"—That independent of the irrelevancy of the fact, in a question of private right secured to creditors by treaty and the law of nations, the prevention of remittances to Great Britain, and "detention of debts during the war," ought not to have been ascribed to the "interdiction of commerce to the United States by the British Parliament:"—For by virtue of a resolution of Congress, which took place on the 10th day of September, 1775, and which was stated and recognized by the Supreme Court of Pennsylvania in deciding the case of *Hoare against Allen*, the exportation of all merchandize and commodities whatsoever to Great Britain, Ireland, or the West Indies, was prohibited; the said resolution rendering it afterwards (as laid down by the court in that case) "unlawful to make remittances to Great Britain:" And on the 20th day of October, 1777, an act of Assembly was passed by the State of Virginia, whereby authority was given, and an invitation held forth to the debtors of British creditors, to pay their debts into the *Loan Office* of the State; (and such payments were afterwards accordingly made in depreciated paper money, at the nominal value, to a great amount;) the preamble of which act of Assembly states a motive for the law in the following terms; "But the safety of the United States demands, and the law and usages of nations will justify, *that we should not strengthen the hands of our enemies* during the continuance of the present war, by remitting to them the profits or proceeds of such estates, or the *interest or principal* of such debts:" Nor can it be received as a better reason for withholding interest on just debts, that "creditors and their factors left Virginia and carried away their books and vouchers, and were inaccessible to the debtors till the return of peace:—" For the proclamation by the governor of Virginia, dated the 3d day of June, 1776, which, with the charges and accusations it contains, as issued in the heat of war, has been printed at full length in the appendix to the answer "strictly requires and enjoins all the natives of Great Britain who were partners with, factors, agents, storekeepers, assistant storekeepers, or clerks here, for any merchant or merchants in Great Britain, on the first day of January, 1776, to depart this Commonwealth with their goods within forty days from the date hereof, except such of the said natives as have heretofore uniformly manifested a friendly disposition to the American cause, or are attached to this country by having wives or children here, agreeable to a resolution of the General Assembly in that case made;" in consequence of which proclamation many persons of the description therein mentioned did of course depart:—That as all coercive measures for recovering payment of British debts were of course suspended during the war, so voluntary payments were thus prevented by laws or public acts of the State, prohibiting remittances to British creditors who were not within the State, and compelling those who were within the State to depart:—And it cannot be just, that laws should first be passed, making remittances unlawful, and driving creditors and their agents from the State; and then interest withheld, because remittances were unlawful, and creditors and their agents absent:—That if it could be maintained, that laws which were avowedly made to detain the money in the country, for the double purpose of weakening the enemy by withholding their property during the war, and of securing the use of it for the public service, had the effect to deprive the creditor of his right to demand payment of interest as well as principal on the return of peace, such laws, so operating against the recovery of the full value of bona fide debts, would of course come within the description of lawful impediments, entitling the creditor, under the treaty of amity, to compensation for the loss thereby sustained:—But from the facts which have been set forth on the part of the United States, there is at least no room for any general presumption, that if the course of remittance had been free, remittance would have been made; or if British creditors and factors

had remained in the State, payments would have been received:—For it is stated in the answer, that “all the products of the land were indispensably necessary for defence, and nothing was left to an individual for paying interest on his debt;” from which it also follows, that nothing can be more remote from all resemblance to the present case, than that of *tender and refusal at law*, to which it has been assimilated in the letter from Mr. Jefferson before-mentioned; the very essence of tender and refusal consisting in the actual offer of the money, and its being *always ready to be paid*:—That as the means which might otherwise have been applied towards payment of British debts, were thus expended in support of the war with Great Britain, it is of no importance to the conclusion, whether that war was “on the side of America” maintained under the circumstances which have been described, and merely “for defence” against hostile aggression; or for the attainment of great and valuable public objects:—For British creditors were individually, on the return of peace as little responsible in the one case, as entitled to or possessed of any participation of benefit from the event in the other:—That all arguments against the just rights of individuals derived from the nature and causes of the war, or reflections on the manner in which it was conducted on the one side or on the other, are besides, as inconsistent with the established principles of the law of nations, as repugnant to the spirit of that discussion which ought to take place in the execution of a treaty of amity:—And so far only will the Board animadvert on the publication of charges against Great Britain respecting the nature and conduct of the war, as stated in the printed answer in this case, and documents thereto annexed, in terms of description which little accord with the business of conciliation and peace:—That the general position in favour of debts due to private persons before a war, as being recoverable on the return of peace, with interest according to the contract, has been stated and admitted on the part of the United States; and in addition thereto the following passage has been quoted from Vattel, viz. “*if nothing else be agreed upon, yet this is to be supposed, that no action shall be commenced for damages done in war, which also is to be understood of those done to private persons, these being also the effects of war*.”—But if this latter position had reference as has been argued, to the case of interest, it would be directly inconsistent with the former; besides being precluded, in its application to the present case, by the condition it contains; for here there is an *express agreement* by treaty to the contrary; and as damage done in war to the property or effects of individuals is not the subject of an action on the return of peace, so it cannot in justice be the ground of objection or defence against an action for recovery on an antecedent right:—That the case which has been put and relied on, as stated in the said letter from Mr. Jefferson, of interest separately secured by an *assignment of lands*, of “a general and national calamity” by which “nothing is made out of the lands” so assigned, and of the stoppage of the currency of such interest during such calamity, bears no analogy whatever to the present case:—For, without enquiring how far the nature of “the general and national calamity” contemplated in the case referred to, supports the comparison; or resting upon the fact, that in this case payment was not withheld from a failure of means, but from the application of those means on the part of the debtor to other purposes, it is sufficient that here there is no such assignment of lands, or specific appropriation and acceptance of a particular security or fund of payment; but a simple, absolute, and unqualified obligation by the debtor, that the debt, principal and interest, without distinction, shall be paid, which nothing short of performance or the creditors voluntary acquittance can either abridge or release:—That the true nature of interest cannot be better described than in the words of Mr. Justice Shippen in the case of *Petit against Wallis*, as follows, viz. “In short, the £5,000 paid with interest at

" at this day is not, in fact or law, more than the £5,000 paid without interest
 " at the day it becomes due :"—That an award of interest during the war, would
 not (as has been urged) create "a loss to the debtor for the sake of a gain to the
 " creditor ;" for according to the compendious description of the nature of inter-
 est which has just been referred to, and the definition already stated, as maintained
 with much argument, and on many authorities, on the part of the United States,
 interest is not gain, but compensation to prevent loss ; so that the denial of interest
 would be gain to the debtor, and loss to the creditor ; with an increase in propor-
 tion to the additional value of money during the war :—That therefore if the Board
 were to depart from their duty, in the impracticable attempt suggested in the answer, of
 placing debtor and creditor " upon an equal footing," by estimating conjectural losses
 and balancing inequalities in their respective situations, advantages, or sufferings, du-
 ring the war, the settled rate of interest might be found in many instances to fall very
 far short of the losses, immediate or remote, sustained by the creditor through the de-
 tention of his debt, at a time when payment was most wanted, while the gain of the
 debtor, in the application or use of the money or property so withheld, might far exceed
 the amount of interest for which he was liable :—That as many individual inhabitants
 of the United States were, doubtless, reduced to a state of insolvency by the war, so it
 is matter of equal notoriety, that many British merchants, and other subjects of his
 Britannic Majesty, were driven to bankruptcy and ruin through the loss of trade,
 non payment of debt, and other circumstances arising from the same common ca-
 lamity ; but it does not appear, nor has it been alledged, that any such claim of
 exemption from interest during the war has ever on that account been attempted or
 set up, or could be maintained in any of his said Majesty's dominions by any such
 British debtor, however unfortunate, or however clearly his losses might be dedu-
 ced from the same cause which has been held a sufficient ground for such exemp-
 tion in favour of American debtors ; so that the principle applied by the learned
 Judge, and on the occasion first above-mentioned, to the case of British creditors
 whose debts had been paid into the State treasury, is equally applicable to the
 present question, and was stated by the said learned Judge in the following terms,
 " The construction on the part of the defendants *excludes mutuality*. The debts due
 " from British subjects to American citizens were not confiscated or sequestered, or
 " drawn into the public coffers. They were left untouched. Now if all the
 " British debtors be compelled to pay their American creditors, and a part only
 " of the American debtors be compelled to pay their British creditors, there will
 " not be that mutuality in the thing which its nature and justice requires. The
 " rule in such case should work both ways ; whereas the other construction creates
 " mutuality and proceeds upon indiscriminating principles. The former construc-
 " tion does violence to the letter and spirit of the instrument ; the latter flows
 " easily and naturally out of it :"—And so it may be said, that if debtors in Great
 Britain to American creditors may be compelled to pay their *full* debts, interest as
 well as principal, and debtors in America to British creditors can only be com-
 pelled to pay a *part* of their debts, viz. principal and part of the interest, the
 construction " excludes mutuality" in the execution of the article, and " does
 " violence to the letter and spirit of the instrument :"—That the alledged equity of
 denying interest during the war, derives no support from the expectation which it
 is said prevailed during the war on the part of debtors in America, that " if the
 " event proved successful" they would be thereby so far relieved from the payment
 of their debts ; for the same expectation may have prevailed to the full extent of the
 whole debt due to subjects of Great Britain, principal as well as interest :—Nor can
 any such equity be supported on the verdicts and decisions of courts against such
 interest ;

interest; whether they have been given in those particular States in which it is alleged "the claims of British debts were so inconsiderable and so few as not to "have occasioned public concern, or to have excited any prejudices;" or in States where the claims of British debts were so considerable and so many as to occasion "public concern" and "excite prejudices."—For such verdicts and decisions against any part of the stipulated or settled interest of just debts, are themselves the subject of complaint before this Board, as lawful impediments to the full recovery of such debts; on the existence and justice of which the Board are bound and authorized exclusively to decide:—That therefore no sufficient cause has been shewn, why in awarding full and adequate compensation for such debts as may be proved, within the intent and meaning of the treaties, full interest should not be awarded for the detention and delay of payment during the war, as well as in time of peace; but on the contrary, for the above reasons, and others which might be stated, it is just that such interest should be awarded, according to the nature and import, express or implied, of the several contracts on which the claim is founded.

Mr. SITGREAVES dissented from the above resolution.

Mr. FITZSIMONS also dissented.

PHILADELPHIA, December 19, 1798.

In the Case of Cunningham & Co.

Mr. SITGREAVES desired to enter his dissent from the resolution in this case passed at the last meeting, for reasons stated in a minute which he presented and read before the Board.

Mr. FITZSIMONS stated that he would prepare a minute containing his reasons against next meeting.

PHILADELPHIA, December 21, 1798.

In the Case of Cunningham & Co.

The minute of dissent of Mr. *Sitgreaves* read at the last meeting is in the following terms. viz.

I HAVE desired to enter my dissent to this resolution, not because I differ from *all* the principles and inferences contained in it, but because there are *many* in which I cannot concur.

I dissent

I dissent also, because it does not specifically apply to the case in which it purports to be resolved:—Because it attempts to establish a general conclusion on a subject, on which no *general or universal proposition* can be accurate or correct:—And because it precedes the proof of the facts, without the knowledge of which it cannot be determined that any *particular or special* rule, in this case, would be just or equitable.

I will proceed to explain, in detail, but with as little prolixity as possible, these different grounds of dissent.

1st. I agree explicitly that the Board, by the sixth article of the treaty of amity, are authorized to consider and determine all claims “whether of principal or interest;” and that therefore there is no sufficient reason, derived from any technical interpretation of the word “debts” in the treaty of peace to *exclude* the consideration of demands of interest *during the war*, or for any other period:—Or to prevent the award of interest, in any case, where it may be deemed just and equitable that it should be paid.

But on the other hand, it is equally clear to my judgment, that the same word “debts,” does not necessarily *include* interest, either during the war, or for any other period:—That this observation is also true of the words “full value” in the treaty of peace, which by sound construction ought to be taken, not as a distinct member of the sentence, but in connection with the words immediately following “in sterling money,” and are indicative, not of the *quantum of the demand*, but of the *mode or quality of the payment*:—That as by the treaty of amity, all claims, “whether of principal or interest,” are to be “determined” according to the merits of the several cases, “due regard being had to all the circumstances thereof,” and as equity and justice shall appear to require,” it obviously follows, that the Board are not of necessity bound, by any interpretation of the words of the former treaty, to award interest, during the war, in *all* cases, but may refuse to award interest in whole or in part, if the *merits and circumstances* of a case shall make it just and equitable that it shall be denied or reduced.

And therefore that any *general* resolution on the subject of interest, either allowing or denying it during the war, or for any other time, is improper, and not conformable to the submission in the treaty; because the allowance or denial is, by the terms of the treaty, made to depend on the *merits and circumstances* of each case;—Not of each *claim*, but of each *case* or item of debt contained in, and constituting a part of each claim.

2nd. That “equity and justice” will require us to deny interest in a variety of cases, in some during the war, in others for a longer term, and in others altogether, will be evident on a consideration of the nature, the meaning, and character of interest:—From this consideration it may also result that, in some cases, the *whole* interest ought to be awarded.

The word “INTEREST” has not always the same signification:—Or rather, it has *two* different and distinct significations. It sometimes means “the hire of money,” or “wages for the use of money:”—This was the ancient acceptation of the term, and is the acceptation in which it is still used by writers on the law of nature and of nations, and on political economics:—This is its proper import when it is stipulated to be paid on a loan, in which case it may be described as of

strict obligation, because it is the essential consideration of the contract, and is emphatically a *part of the debt*:—It is a distinguishing feature of this species of interest, that it may be owing *before the principal is due*, as in contracts for money payable at a distant day, but bearing a present annual interest.

In the *other* signification of the term, *interest* is synonymous with *damages*:—It is damages for the breach of contract, or more properly “it is the common measure of damages where the contract is for money,” 2 Tr. Eq. lib. 5, ch. 1. s. 1. This is the acceptance which most frequently occurs in municipal jurisprudence, and which chiefly applies to that vast variety of the common transactions between individuals, in which the failure of punctuality is a ground of complaint in the courts of justice:—In this sense it partakes essentially of the nature of *damages in general*, from which it is only distinguishable in this, that it is measured by an uniform rule, “fixed by the law to a certain portion of the sum that is due; for “the space of a year, and proportionably for a longer or shorter time.” 1 Dom. lib. 3. tit. 5. But conformably to the general character of *damages*, and contrary to the attribute of the sort of interest first described, it can never accrue until there has been a *default of the party* in the performance of his contract—and, like damages, it is dependent on the circumstances of that default; for, when it shall commence, when it shall cease, when it may be suspended, when it shall be received, or whether it shall be paid at all, are all questions to be governed by the circumstances, and decided differently as those circumstances shall vary:—This sort of interest has been obviously contemplated by the treaty, when it has adopted the expressions before quoted, and which it has well described by directing that such claims shall be determined “according to the merits of the several cases, due regard being “had to all the circumstances thereof.”

In cases to which the *first* sense of the word applies, that is, in cases where interest is of *strict obligation*, and forms a *part of the debt*, I agree that the *whole* interest must be paid, as well during the war, as for any other period. I think the law of nations, and the stipulation of the treaties equally produce this effect, and that though the state of war suspended the *remedy*, it did not suspend the *right*:—I incline to think that the same acceptance of the term will apply to those cases of *specialty*, for whatever reason given, which *expressly* bear interest on the face of the *instrument*, altho’ on this subject I desire that I may not be considered as concluded by this intimation, as the enquiry does not, at least yet, appear to be essentially connected with this argument, *in this case*:—The question of interest, according to the *usage of a trade* is still more doubtful, and I decline at present giving any opinion upon it.

But as to all *other* kinds of debt which may be the subjects of claim, it does not seem to me to admit of a doubt, that interest, during the war, cannot rightfully be awarded. It is already shewn that interest, in cases of every description than those just enumerated, being in the nature of *damages*, can only accrue on the *default* of the party:—It cannot be pretended that there is a *default*, where, from circumstances *beyond the controul of the party*, payment is rendered impracticable:—Nor can it be denied that a state of war between the nations of the creditor and debtor is *such a circumstance*. This is a position altogether independent of any supposed distinction grounded on the nature of the war between the United States and Great Britain, as different from ordinary wars, which has been contended for in the answer, and so elaborately combated in the resolution; and it is equally uninfluenced

enced by any considerations deduced from the merits of the contest, or from the legislative acts passed on the one side or the other. I agree, that in executing a treaty, designed to terminate differences between the nations, "in such a manner" as without reference to the merits of their respective complaints and pretensions, may be best calculated to produce mutual satisfaction and good understanding," these considerations, on either side, are irrelevant and improper:—But it is a *necessary incident of all wars*, to interdict and cut off all communication between the individuals of the hostile nations; and this is completely effected without any prohibitory laws on either side. It is of no import, therefore, what those laws were, or on which side aggression commenced—it is sufficient to the purpose that the nations *were at open war*, and that their people respectively could not lawfully have intercourse with each other. From this state of things it inevitably resulted, that the debtor was prevented by the intervention of a circumstance, not attributable to him as *fault* or *laches*, from compliance with his contract; and that if thereby the creditor has sustained a loss it is *damnum atque injuria*, and he is not entitled to reparation in damages from the debtor.

If this obvious inference from undeniable principles could need any confirmation, it is to be expressly found in the letter from Mr. Hammond to the Secretary of State, complaining of infractions of the treaty of peace by the United States:—On this very subject of interest during the war, he thus writes. "In one State" (Massachusetts Bay) where great property was at stake, *justice has been liberally dispensed*, and, notwithstanding a particular regulation of the State warranted the deduction of that portion of the interest on the British debts which accrued during the war, the courts, in conformity to the plain terms of the treaty, have admitted and directed the quantum of the demand to be regulated by the original contract, and where the contract bore interest, or the custom of the trade justified the charge the full interest has been allowed to British creditors, notwithstanding the intervention of war:—"This is conceived to be a formal and express admission, on the part of the British government, that the payment of interest during the war, in cases where the contract bore interest, or the custom of the trade justified the charge, was all that was required by the plain terms of the treaty of peace"—and that in cases of every other description, there cannot be a reasonable pretence to claim or demand it.

In truth, the books of authority on natural and civil law, as well as on the laws of England, leave no room for doubt on the subject:—A few, and but a few, are here cited.

"All the sorts of reparation of damage are reduced to two kinds; one which is barely called interest—and the other costs and damages."

1 *Do. lib. 3. tit. 5.*

2 *Tr. Eq. lib. 5. ch. 1. s. 1.*

"Interest is the reparation of damages which is due from debtors who owe sums of money, and who fail in the payment thereof." 1 *Do. lib. 3. tit. 5. § 1.*

"Debtors incur the penalty of interest by their delay to pay what they owe, according as the said delay may be imputed to them, and may have that effect, which depends on the nature of the credits and the circumstances. *Ibid.*"

"In

"In case of accidents which happen *without any fault* of the party, he will not be liable to reparation of damages, by the rule that nobody is to answer for accidents, except there be some fault on their part."

1 *Do. ubi. sup.*

2 *Tr. Eq. Lib. 5. ch. 1. § 1.*

"By *damage* we understand any loss or diminution of what is a man's own, occasioned by the *fault* of another:—And by a fault we understand every unlawful act or omission."

1 *Ruth. ch. 17. § 1.*

If a misfortune has happened without the *fault* of either party, "there is no reason to throw off the loss from one innocent man to another innocent man:—In such case *potior est conditio defendentis*."

3 *Burr. 1357.*

"Damages are in the power of the court, and therefore they usually order them as they see convenient." 2 *Tr. Eq. Lib. 5. ch. 1. § 5.* The cases cited to illustrate this position are *all of interest*.

"The instances in which the court has exercised its discretion, in allowing a greater or less rate of interest, are too many and various to allow of enumeration." *Ibid in notis.*

"It would be unreasonable that those things which are inevitable, which no industry can avoid, no policy prevent, should be construed to the prejudice of any person in whom there is no locket."

1 *Powell on Cont. 446.*

There might be added a great many more authorities of the most unequivocal import; but these are deemed sufficient to prove what has been advanced,

3d. The claim in which this resolution is offered, is a most unfortunate one for the establishment of an affirmative rule on the allowance of interest during the war, or even for any period whatever.

From all that yet appears, and so far as a judgment may be formed from the claim and schedules which accompany it, there is not a single item which can be said to come within that class of contracts, that carry interest of the first description I have mentioned; that is, where the interest is a *part of the debt*, either by the terms of the contract, or even by the usage of trade.

The items are principally of *accounts* which have been incurred in the course of *retail dealings* in the State of Virginia; and which, so far from being entitled to interest during the war, are not, either by the law of England or America, entitled to interest at all as a matter of course:—And even if it should be denied, that the intervention of war is an excuse for the debtor, it cannot surely be pretended that it gives to the creditor an accumulative right which he would not otherwise have possessed.

It is assumed in the answer on the part of the United States, that debts of this description have at no time carried interest in Virginia; and the contrary has not been asserted either in the claim or reply.

And

And the acknowledged doctrine of the law of England must, on every principle of mutuality, preclude all demand of interest in such cases.

It is a general rule of the English law, as well as of the civil law, that interest shall not be allowed on profits; and the reason assigned is, that as interest, strictly speaking, is itself the profit to which a man is entitled for the use of his money, so the right is satisfied if that right is obtained in another way, in which case the profit is in lieu of interest--thus, interest, except in very special cases, shall not be allowed on interest:--Nor on rents which are the profits of land that represents money:--Nor on arrearages of annuities, which are compounded of principal and the interest or profit:--Nor on goods sold and delivered, the profit on which is equivalent to the interest on the capital employed in the trade.

But whatever may be the reason, it is most clearly settled by numerous decisions, both at law and in equity, that simple contracts, and debts on open accounts, and for goods sold and delivered, do not, of course, carry interest:--And this has, so late as in 1793, been solemnly determined by the present Lord Chancellor, even where the amount has been ascertained by the Master's report, in the case of *Creuze v. Lowth*, 4 Br. Ch. Rep. 317. Reported also in 2 Vesey, junior, 157, under the title of *Creuze v. Hunter*--which case was decreed after a careful revision of the rules and practice of the court in former cases.

The opinion of the preceeding Lord Chancellor, in the case of *Boddam v. Riley*, 2 Br. Ch. Rep. 3, and which I transcribe here because it is conclusive on most of these items, shews also, that they derive no additional title to interest from the mere circumstance of their being due on balances:--He says,

"The cases cited apply only where there are accounts regularly stated between the parties, in which case there is an implied contract on the part of the debtor to pay; and all contracts to pay, undoubtedly give a right to interest from the time when the principal ought to be paid:--But this is not so here:--It is true, the sum claimed does, in fact, appear to be due, on a balance, at the close of the account; but there was no settlement, or acknowledgment by the debtor, which raises a contract to pay, and which is the only ground upon which interest is given, 1 Wms. 653, for according to the argument of the exceptant, that whatever appears to be due on the balance of an account shall carry interest, the rule must go to every debt for goods sold and delivered, which certainly is not the law of this country."

There are unquestionably, many qualifications and exceptions to this rule relative to interest on simple contract debts, as well as to the rules relative to every other description of debts:--But it is not necessary to advert to these exceptions in an argument of this general nature, especially as they are not stated to apply to any part of this case:--These exceptions however prove how impracticable it is to arrive at any general result on a subject, which is liable to such an infinite variety of modifications, and how improper it is, that any resolution should precede the proof of the merits and circumstances of the particular case in which interest is demanded.

It would be easy to adduce numberless other proofs and illustrations in support of the principles herein advanced:--And also to lay down many other positions affecting the claim of interest, in whole or in part, in various cases submitted to the decision of the Board:--I have purposely avoided this sort of anticipation, and have
endeavoured

endeavoured to be as brief as possible; because, as I disapprove altogether of these premature and argumentative Resolutions, it is proper that I should conform my practice to this sentiment, as far as the course which has been pursued will permit, for the explanation and vindication of my own opinions.

(Signed)

September 19, 1798.

S. SITGREAVES.

Mr. FITZSIMONS read a minute of his dissent, which is as follows:—

I desire to enter my dissent to the Resolution passed by the Board on the 18th inst. in this case, on the subject of interest during the war—for the following reasons:—

BECAUSE the debts which are the subject of the resolution, were payable in the then colonies now United States:—And it is admitted by the creditors, that for a considerable period there were no persons in the United States authorized to receive these debts:—

It therefore appears to me to be highly unreasonable, that a debtor should be made subject to the payment of interest on a debt, which the absence of the creditor rendered it impossible for him to discharge:—

Because, at the close of the war, when all its effects were strongly impressed upon the minds of the creditors, an abatement of interest for that period was generally allowed, and settlements to a very great amount have since been made with that allowance.

Judgments of courts, verdicts of juries, and awards of referees, have almost universally been made upon the same principle, which proves irresistibly the general opinions of its equity by people perfectly well informed of all the circumstances of the case; nor ought their opinions to be shaken by a decision given at a time when many of the circumstances which influenced them must have lost their effect.

(Signed)

THO'S. FITZSIMONS.

THE said minutes of dissent having been read, the Board *RESOLVED*, That in decid'g against an objection to the payment of interest during the war, maintained generally and without regard to the nature and import of the contract, express or implied, They do not preclude, but necessarily save all objections to the payment of interest which may arise out of the contract, or other special circumstances of the case.

Extracted from the proceedings of the Board,

G. EVANS, Secretary.

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